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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

GARRY PHILLIP WATSON,

Defendant and Appellant.

B269654

(Los Angeles County
Super. Ct. No. PA025999)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Noah P. Hill and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

In 1997, appellant Garry Phillip Watson was convicted of assault by means of force likely to produce great bodily injury, and was sentenced to a term of 26 years to life as a “three strike” offender. In the underlying action, the trial court denied appellant’s request under Penal Code section 1170.126 to be resentenced pursuant to the Three Strikes Reform Act of 2012 (Reform Act).¹ We reject his challenges to that ruling and affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. 1997 Conviction

In April 1997, an information was filed charging appellant in count 1 with corporal injury to a spouse, namely, Renee Watson (§ 273.5, subd. (a)), and in count 2 with assault upon Marilyn Wright by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)).

Accompanying the charge in count 1 were allegations that appellant had suffered three prior convictions constituting strikes under the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and three prior convictions for which he served prison terms (§ 667.5).

At trial, the prosecution presented evidence that in February 1997, appellant resided in an apartment with his

¹ All further statutory citations are to the Penal Code.

wife, Renee Watson. In another apartment in the same complex lived appellant's aunt, Marilyn Wright.

Delbert Teis testified that on February 1, 1997, while in the apartment complex's parking lot, he heard Watson say, "I need to go to the hospital." Teis then heard Watson say, "Don't hit me," and saw appellant next to her. Several people gathered, including the apartment complex's manager, her husband, and Wright. Appellant grabbed Watson, swung her into a nearby wall, and struck her face with a closed fist. When Wright and others tried to intervene, appellant punched Wright in the chest. Appellant then struggled with the landlady's husband until Teis and others restrained appellant.

Wright testified that while in her apartment, she heard yelling and screaming. Through her apartment window, she saw appellant grab Watson and throw her against a wall. Wright hurried to the scene of the incident, where she observed a man trying to separate appellant from Watson. Wright attempted to calm appellant, who grabbed her by the throat and choked her. When she resisted him, he punched her chest twice with his fist. Watson fled, followed by Wright. As Wright left, appellant spit at her and called her a "fucking bitch." After the incident, Wright's chest and neck were red, and her arm was bruised. Because her arm swelled and she appeared to have a wrist injury, at a doctor's request, she wore a wrist brace for three weeks. According

to Wright, Watson displayed a bump on the back of her head and a bruise on her knee.²

Watson testified that on February 1, 1997, she and appellant fell into an argument when she told him that she intended to visit a hospitalized friend. She denied that he physically attacked her or Wright.

A jury found appellant guilty of assault by means of force likely to produce great bodily injury, as charged in count 2, but was unable to reach a verdict regarding the offense charged in count 1, namely, corporal injury to a spouse. After appellant admitted that he had suffered three prior convictions constituting strikes and one prior conviction for which he served a prison term, the trial court dismissed count 1. In July 2007, appellant was sentenced to a term of 25 years to life under the Three Strikes law, plus a one-year enhancement (§ 667.5). In an unpublished opinion, this court affirmed the judgment. (*People v. Watson* (Sept. 30, 1998, B115472).)

B. Motion and Petition for Recall of Sentence

In 2012, the electorate enacted the Reform Act by approving Proposition 36. (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 169-170.) The Reform Act amended the

² Los Angeles Police Department Officer Leonard Drayton, who responded to the incident, also testified that there was a bump on the back of Watson's head and a bruise on her knee.

Three Strikes law to provide that absent specified exceptions, an offender with two or more prior strikes is to be sentenced as a two-strike offender unless the new offense also is a strike, that is, a serious or violent felony.³ (See *ibid.*) The Reform Act also added section 1170.126, which creates a post-conviction resentencing proceeding for specified inmates sentenced under the prior version of the Three Strikes law. (*Ibid.*) Under that statute, a defendant sentenced as a three-strike offender may petition for recall of the sentence and for resentencing, but is subject to certain eligibility criteria. (§ 1170.126, subd. (e).)

In May and June 2013, appellant filed a motion and a petition for resentencing pursuant section 1170.126. On January 11, 2016, the trial court denied the motion and petition, concluding that appellant was ineligible for resentencing because he intended to inflict great bodily injury on Wright and Watson (§§ 667, subd. (e)(2)(C)(iii), 1170.126, subd. (e)(2)). In so ruling, the court stated that to the extent *People v. Berry* (2015) 235 Cal.App.4th 1417 (*Berry*) barred consideration of the evidence relating to the dismissed charge involving Watson, there was “enough [evidence] to show [appellant] intended to inflict great bodily injury as to [Wright].” This appeal followed.

³ Generally, an offense is a “strike” if it is either a “violent felony” under section 667.5, subdivision (d), or a “serious felony” under section 1192.7, subdivision (c). (*People v. Blackburn* (1999) 72 Cal.App.4th 1520, 1525.)

DISCUSSION

Appellant challenges the trial court's ruling that he is ineligible for resentencing under an exclusion that applies if "[d]uring the commission of the current offense, [that is, the offense which the resentencing petition targets] the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person." (§§ 1170.12, subd. (c)(2)(C)(iii), 1170.126, subd. (e)(2).) Appellant's principal contention is that the court improperly made an independent finding regarding his intent to inflict great bodily injury on Wright. In addition, appellant contends the standard of proof for the eligibility fact is proof beyond a reasonable doubt.

A. Independent Determination of Eligibility Fact

We begin with appellant's contention regarding the court's independent determination of the crucial eligibility fact, namely, that appellant intended to inflict great bodily injury on Wright.⁴ As the resentencing statute does not require that eligibility facts have been resolved by the verdicts or special findings rendered at trial, many decisions

⁴ Although appellant notes that the trial court found he intended to inflict great bodily injury on Wright and Watson, the focus of his challenge is on the finding relating to Wright. Because we find no error regarding that finding, it is unnecessary for us to examine the finding relating to Watson.

have concluded that the trial court may independently examine the record of conviction in order to make determinations regarding those facts.⁵ (See, e.g., *People v. White* (2014) 223 Cal.App.4th 512, 526-527; *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1028-1040 (*Osuna*); *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048; *People v. Manning* (2014) 226 Cal.App.4th 1133, 1139-1144; *People v. Elder* (2014) 227 Cal.App.4th 1308, 1314-1336; *People v. Bradford* (2014) 227 Cal.App.4th 1322, 1338-1340 (*Bradford*); *People v. Brimmer* (2014) 230 Cal.App.4th 782, 799-801; *People v. Hicks* (2014) 231 Cal.App.4th 275, 283-286 (*Hicks*).) This court reached the same conclusion in a recent decision (*People v. Frierson* (2016) 1 Cal.App.5th 788, 791-793, rev. granted Oct. 19, 2016, S236728 (*Frierson*)).

Instructive discussions are found in *Bradford* and *Hicks*. In *Bradford*, evidence was presented at the defendant's trial that he robbed several stores, and had a pair of wire cutters in his pocket when arrested. (*Bradford*, *supra*, 227 Cal.App.4th at pp. 1329-1330.) He was convicted

⁵ The term "record of conviction" has been used "technically, as equivalent to the record on appeal [citation], or more narrowly, as referring only to those record documents reliably reflecting the facts of the offense for which the defendant was convicted." (*People v. Reed* (1996) 13 Cal.4th 217, 223.) The record of conviction includes the transcript of the jury trial. (*People v. Bartow* (1996) 46 Cal.App.4th 1573, 1579-1580.)

of three counts of robbery, and was sentenced as a “three strikes” offender. (*Id.* at p. 1327.) In denying the defendant’s petition for recall and for resentencing, the trial court ruled that he was ineligible for relief, concluding that because he had a pair of wire cutters when arrested, he had been armed with a deadly weapon during the commission of the robberies. (*Id.* at p. 1330.)

The appellate court concluded that in the absence of verdicts or special findings resolving the defendant’s eligibility for resentencing, trial courts are authorized to make independent factual determinations regarding the eligibility criteria stated above. (*Bradford, supra*, 227 Cal.App.4th at pp. 1331-1334, 1336-1337.) As the court noted, the eligibility criteria did not describe or “clearly equate to” any offenses or enhancements. (*Id.* at p. 1332.) In discussing the independent factual determinations, the court concluded that the trial court’s inquiry is “necessarily retrospective,” and akin to the task facing a sentencing court assessing whether a prior conviction may be proved as an enhancement. (*Id.* at p. 1337.) The court thus looked for guidance to a line of cases addressing that task stemming from *People v. Guerrero* (1988) 44 Cal.3d 343, 355 (*Guerrero*), in which our Supreme Court held that sentencing courts may examine the record of conviction to determine the “substance” of a prior conviction for purposes of establishing an enhancement. (*Bradford, supra*, at pp. 1338-1340.) In view of the *Guerrero* line of cases, the court concluded that the trial court may examine the record of conviction in order

to determine eligibility facts. (*Ibid.*) The court otherwise found it unnecessary to decide whether *Guerrero* and its progeny governed other issues applicable to the eligibility determination.⁶ (*Id.* at pp. 1339-1340, 1336-1337.)

In *Hicks*, police officers frisked the defendant after he appeared to throw away a bag containing drugs, and found he had several .380 caliber bullets. (*Hicks, supra*, 231 Cal.App.4th at pp. 280-281.) When the officers searched a nearby apartment occupied by someone the appellant had intended to visit, they found a backpack containing a loaded .380 caliber gun. (*Ibid.*) The defendant and his half-brother testified that the bullets and the gun belonged to the half-brother. (*Ibid.*) After the defendant was convicted of possession of a firearm as a felon and possession of ammunition as a felon, he was sentenced as a three-strike offender on the basis of the former offense. (*Ibid.*) In thereafter rejecting the defendant's petition for resentencing, the trial court determined that he was ineligible, concluding that he was armed with a firearm when he committed the

⁶ Because the evidence at trial disclosed only that the defendant had a pair of wire cutters in his pocket when arrested, but not that the wire cutters were intended for use as a weapon, the court determined, as a matter of law, that the evidence was insufficient to establish that the defendant was armed with a deadly weapon during the commission of the robberies. (*Bradford, supra*, 227 Cal.App.4th at pp. 1341-1343.)

offense of possessing a firearm as a felon. (*Id.* at pp. 279-280, 284.) The appellate court affirmed, reasoning that the defendant’s eligibility hinged on whether he was “armed with a firearm” while he possessed it as a felon, and that the trial court was authorized to make an independent determination regarding that factual issue on the basis of the record of conviction. (*Id.* at pp. 283, 284, 285-286.) The court further rejected a contention predicated on the existence of conflicting evidence relating to the determination, stating “[c]onflicting evidence . . . does not cast doubt on the trial court’s factual findings because we review factual findings for substantial evidence.” (*Id.* at p. 286.)

Appellant maintains that trial courts may not make independent determinations of eligibility facts under the resentencing statute, relying on restrictions applicable to sentencing courts in assessing whether a prior conviction may be proved as an enhancement, as set forth in *Guerrero* and subsequent decisions. Appellant argues that under those restrictions, the trial court’s inquiry regarding eligibility facts is limited to identifying the “facts . . . already found[,] as reflected by the conviction.”⁷

⁷ Appellant places special emphasis on *People v. Wilson* (2013) 219 Cal.App.4th 500, 510, which held that under *Guerrero*, the trial court may not impose an enhancement on the basis of an independent determination of a disputed factual issue. Although *Wilson* also concluded that *Apprendi* (Fn. continued on next page.)

In *Frierson*, we rejected an essentially identical contention. (*Frierson, supra*, 1 Cal.App.5th at pp. 791-793, rev. granted.) There, the defendant was convicted of stalking and sentenced as a “three strike” offender. (*Id.* at p. 791.) In ruling that the defendant was ineligible for resentencing, the trial court found that he engaged in the offense with the intent to inflict great bodily injury, relying on trial evidence that he sent the victim letters stating he would injure and kill her. (*Ibid.*) We determined that the court’s fact finding was proper notwithstanding the restrictions traceable to *Guerrero*, concluding that they reflect concerns applicable to the enhancement of punishment, whereas the resentencing statute provides only for a reduction in punishment. (*Id.* at pp. 791-793.) We abide by *Frierson*. (See also *People v. Newman* (2016) 2 Cal.App.5th 718, 726 (*Newman*) [rejecting similar contention predicated on *Guerrero* and its progeny].)

Appellant’s reliance on *Berry* is misplaced, as that decision held only that the trial court, in making an eligibility finding under the resentencing statute, may not

v. New Jersey (2000) 530 U.S. 466, 490 establishes a similar restriction regarding the imposition of enhancements, appellant has expressly declined to assert a contention predicated on *Apprendi*, which several courts have determined to be inapplicable to the resentencing statute (*Blakely, supra*, 225 Cal.App.4th at pp. 1058-1062; *Osuna, supra*, 225 Cal.App.4th at pp. 1038-1040; *Bradford, supra*, 227 Cal.App.4th at pp. 1334-1335).

examine facts underlying certain dismissed charges. After the defendant pleaded guilty to fraud and forgery charges pursuant to a plea agreement, other charges alleging his possession of a firearm were dismissed, and he was sentenced as a “three strike[]” offender. (*Berry, supra*, 235 Cal.App.4th at pp. 1421-1423.) Upon a review of the facts that the defendant admitted in entering his pleas, the trial court denied the defendant’s petition for resentencing, concluding that he was armed while committing the offenses to which he pleaded guilty. (*Id.* at pp. 1421-1423.) Reversing, the appellate court held that the trial court erred in relying on the admitted facts underlying the dismissed counts, concluding that they fell outside the record of conviction relating to the offenses to which he pleaded guilty. (*Id.* at p. 1428.) In contrast, here the trial court based its finding regarding appellant’s intent to inflict great bodily injury on Wright on the evidence underlying his conviction for assaulting her.⁸

⁸ Appellant also directs our attention to *People v. Oehmigen* (2014) 232 Cal.App.4th 1, 3-4 (*Oehmigen*), which examined whether defendants seeking relief under the three strikes resentencing statute are entitled to an evidentiary hearing on their eligibility. There, the defendant was sentenced as a three-strike offender after pleading guilty to assault with force likely to cause great bodily injury. In entering the plea, the defendant stated that he had directed his speeding car at a pursuing police vehicle, thus requiring its occupants to make an evasive maneuver, and that after
(*Fn. continued on next page.*)

he crashed his car, officers found in it a gun and pipe bombs. (*Id.* at pp. 5-6.) When the defendant sought resentencing, the trial court concluded that the limited record of judgment established his ineligibility, as it showed that his conviction involved both being armed with deadly weapons and an intent to inflict great bodily injury. (*Id.* at p. 6.) On appeal, the defendant contended that he was entitled to an evidentiary hearing on his eligibility, pointing to the requirement for an evidentiary hearing on a petition for habeas corpus upon a *prima facie* showing of relief based on a contested issue of fact. (*Ibid.*) The appellate court concluded that the three strikes resentencing statute imposes no requirement for an evidentiary hearing on eligibility. (*Id.* at pp. 6-7.) In rejecting the defendant's analogy to habeas corpus proceedings, the court stated that eligibility is a question of law, "not a question of fact that requires resolution of disputed issues" and that the facts "are limited to the record of conviction" (*Id.* at p. 7, italics omitted.)

Oehmigen is not persuasive on whether the trial court may make independent eligibility findings. *Oehmigen* did not confront that issue, as the facts in the limited record of conviction -- that is, the defendant's admissions in entering the plea -- were undisputed. (*Oehmigen, supra*, 232 Cal.App.4th at p. 8.) Furthermore, *Oehmigen* buttresses its assertion that eligibility is a question of law solely by a citation to *Bradford*, which characterizes the eligibility determination as factual (*Bradford, supra*, 227 Cal.App.4th at pp. 1334, 1343).

Appellant suggests that the record of conviction contains insufficient evidence to support the trial court's finding. We disagree. A defendant's intent is properly inferred from the circumstances surrounding the crime. (*People v. Pitts* (1990) 223 Cal.App.3d 606, 888 ["Intent is rarely susceptible of direct proof and must usually be inferred from a consideration of all the facts and circumstances shown by the evidence"].) The trial evidence established that when Wright tried to calm appellant, he grabbed her by the throat, choked her, and punched her twice in the chest with his fist before she fled from him. As the result of this assault, she suffered what appeared to be a wrist injury that caused her arm to swell, and wore a wrist brace for three weeks at a doctor's request. In addition, Wright's chest and neck were red, and her arm was bruised. The trial court thus reasonably concluded that appellant assaulted Wright with the intent to inflict great bodily injury on her. In sum, the trial court did not err in making an independent determination regarding that eligibility fact.

B. *Standard of Proof*

Relying on *People v. Arevalo* (2016) 244 Cal.App.4th 836, appellant contends that eligibility facts must be determined on the basis of the beyond-a-reasonable-doubt standard, rather than on the preponderance-of-the-evidence

standard, in view of the rights and interests at stake.⁹ There is a division of opinion among the appellate courts regarding that issue.¹⁰ In *Osuna*, the court concluded that the trial court is authorized to make eligibility findings on the preponderance of the evidence, relying on Evidence Code section 115, which provides that “[e]xcept as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence.” (*Osuna, supra*, 225 Cal.App.4th at pp. 1038-1040.) In contrast, in *Arevalo*, the court concluded that the appropriate standard is proof beyond a reasonable doubt. (*Arevalo, supra*, 244 Cal.App.4th at p. 852.) In *Frierson*, we rejected *Arevalo* in favor of the “generally accepted rule” set forth in *Osuna*, stating: “Preponderance is the general standard under California

⁹ Generally, “[t]he burden of proof thus serves to allocate the risk of error between the parties, and varies in proportion to the gravity of the consequences of an erroneous resolution. [Citation.] Preponderance of the evidence results in the roughly equal sharing of the risk of error. [Citation.] To impose any higher burden of proof demonstrates a preference for one side’s interests. [Citation.] Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake[.]” (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1490.)

¹⁰ The issue regarding the correct standard of proof is before our Supreme Court in the review of *Frierson*.

law, and there is no showing that trial courts will be unable to apply it fairly and with due consideration. Nor is there a showing that they have failed to do so.” (*Frierson, supra*, 1 Cal.App.5th at pp. 793, 794, rev. granted.) We see no error in that rationale. (See also *Newman, supra*, 2 Cal.App.5th at p. 728 [reaching similar conclusion regarding applicable standard of proof].)

DISPOSITION

The order of the trial court is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.